

BRIEF OF RESPONDENT
MECKLENBURG BOARD OF ALCOHOLIC
BEVERAGE CONTROL IN OPPOSITION
TO PETITION FOR CERTIORARI

UNITED STATES SUPREME COURT

NO. 77-1454

Ralph S. Abernathy, Administrator of the
Estate of Eural Frank Abernathy,
PETITIONER

vs.

Schenley Industries, Inc., Schenley
Distillers, Inc., Schenley Affiliated
Brands Corp., and Mecklenburg Board of
Alcoholic Beverage Control,
RESPONDENTS

John G. Golding
Counsel of Record for Respondent
Mecklenburg Board of Alcoholic Beverage
Control

OF COUNSEL:

Golding, Crews, Meekins, Gordon & Gray
806 East Trade Street
Suite 301-400 Attorneys Building
Charlotte, North Carolina 28202
Telephone: (704) 374-1600

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REPORTS OF OPINIONS IN COURTS BELOW

1. Abernathy v. Schenley Industries, Inc., et al , 420 F. Supp. 1 (W.D.N.C. 1976).

2. Abernathy v. Schenley Industries, Inc., et al, 556 F. 2d 242 (4th Cir. 1977).

STATUTES AND COURT RULES INVOLVED IN
THE CASE AND NOT SET FORTH IN THE
PETITION

1. 28 U.S.C. §2001(c). Text set forth in the Appendix. (A-1).

2. Rule 40(a) of the Federal Rules of Appellate Procedure. Text set forth in the Appendix. (A-2).

3. North Carolina General Statutes §1-46 and §1-53(4) (Replacement Volume 1A, General Statutes of North Carolina at pages 71 and 111-112 [The Michie Company, 1969])). The

text is set forth in the Appendix. (A-3,4).

4. The following sections of North Carolina General Statutes Chapter 18A:

(a) N.C.G.S. §18A-1 (Replacement Volume 1C, at page 318, General Statutes of North Carolina, The Michie Company, 1975);

(b) N.C.G.S. §18A-10 (Replacement Volume 1C, page 328, General Statutes of North Carolina, The Michie Company, 1975);

(c) N.C.G.S. §18A-15(14) (Replacement Volume 1C [1977 Cumulative Supplement at page 175], General Statutes of North Carolina, The Michie Company, 1977);

(d) N.C.G.S. §§18A-17(1), (2), and (7) (Replacement Volume 1C, page 335, General Statutes of North Carolina,

The Michie Company, 1975).

The text is set forth in the
Appendix. (A-5,A-7).

STATEMENT OF THE CASE

This is an action for wrongful death commenced in the District Court on December 23, 1975 with the filing of a Complaint in which Petitioner alleged that on December 29, 1973 Eural Frank Abernathy consumed a quantity of whiskey sufficient to cause his death. The Ancient Age bourbon whiskey which Petitioner's intestate is alleged to have consumed was distilled and distributed by the Schenley Respondents and sold to him by the Mecklenburg Board of Alcoholic Beverage Control, an agency of the State of North Carolina granted exclusive control and jurisdiction over the sale of alcoholic beverages in Mecklenburg County, North Carolina under North Carolina General Statutes §§18A-17(1), (2) and (7). (A-5,6,7).

In his Complaint, Petitioner asserted that his intestate was ignorant of the hazards of consuming an excessive quantity of beverage alcohol; that his intestate's death was caused by acute ethanol poisoning; and that the failure of Respondents to warn intestate of the risks of excessive consumption give rise to claims in favor of Petitioner against Respondents under federal and state law.

Following the District Court's denial of Respondents' Motions for Summary Judgment on July 31, 1976, Respondents filed motions to reconsider. On September 27, 1976 the District Court dismissed the federal claims on the merits and declined to exercise

pendent jurisdiction as to the claims asserted under state law. Abernathy v. Schenley Industries, Inc., et al, 420 F. Supp. 1 (1976). From this Order, Petitioner appealed to the Court of Appeals for the Fourth Circuit. On appeal, Petitioner neither presented an issue nor addressed argument pertaining to the District Court's discretionary non-exercise of pendent jurisdiction as to the state law claims; rather, the scope of Petitioner's appeal was confined to a review of the dismissal of the federal claims on the merits.

In a per curiam opinion, the Court of Appeals affirmed the District Court's dismissal of the federal claims on the merits and concluded, citing United Mine Workers v. Gibbs, 383 U.S.

725-726 (1966), that the District Court did not abuse its discretion in denying pendent jurisdiction to the Petitioner's state law claims. Abernathy v. Schenley Industries, Inc., et al, 556 F. 2d 242 (4th Cir. 1977). The appeal was decided on June 7, 1977.

Rather than file a timely petition for rehearing in the Court of Appeals or for writ of certiorari in this Court, or seek to obtain an extension of time to do either, Petitioner brought an action against the Schenley defendants in state court on September 23, 1977 asserting essentially the same state law claims he had asserted in the District Court almost two years earlier.

Petitioner proceeded in this fashion in spite of the fact that the North Carolina statute of limitations applicable to Petitioner's state court action had run on December 29, 1975. The state court, upon the Schenley Respondents' Motion for Summary Judgment, on February 21, 1978 dismissed the action, holding that Petitioner's claim was barred by the statute of limitations. (See Exhibit E appended to the Petition).

Petitioner gave notice of appeal to the North Carolina Court of Appeals.

Following dismissal of his action in state court, which was destined to fail because of the running of the statute of limitations long before its commencement and before the Court of Appeals' decision in this case,

Petitioner filed in the Court of Appeals in this case a motion, the text of which is set forth as Exhibit F appended to the Petition. Through this motion, Petitioner, for the first time in this case, addressed himself to the District Court's discretionary non-exercise of pendent jurisdiction as to the state law claims, and Petitioner sought to have the Court of Appeals to enter an order directing the District Court to try the state law claims. The Court of Appeals declined to do so. (See Exhibit G appended to the Petition).

The Petition for Writ of Certiorari was filed in this Court on April 12, 1978. The argument of Respondent Mecklenburg Board of Alcoholic Beverage Control opposing

the grant is set forth below.

ARGUMENT

Petitioner, in support of his contention that the Court of Appeals mislead him to his detriment, asserts that because the Court of Appeals cited United Mine Workers v. Gibbs, supra, he was "mandated" or ordered to bring an action on his state law claims in state court. In spite of the fact that he knew, or should have known, that the North Carolina statute of limitations applicable to his state law claims had run almost two years earlier, he states that he filed the state court action in good faith reliance upon this "mandate." He assumed that if he had filed a timely petition for rehearing in the Court of Appeals, the Court would have insisted that he try to get a

state court ruling on a state law claim long since barred by the statute of limitations. He argues that the Court of Appeals led him into a "desceptive trap" with its "mandate" and suggests that the Court of Appeals' opinion was a "mockery." Petitioner also claims that he has been diligent and that he has not been guilty of default or ineptitude.

In truth, Petitioner, from the outset, could have protected his state law claims by asserting them in an action in state court commenced prior to the running of the state statute of limitations. The pendency of neither the District Court action nor the state court action would have barred the other. Conservation District v. United States, 424 U.S.

800 (1976), reh. denied 426 U.S. 912;
Kline v. Construction Company, 260 U.S.
226 (1922); Allen v. Trust Company, 35
N.C. App. 267, 241 S.E.2d 123 (1978).
In Allen v. Trust Company, supra, the
North Carolina Court of Appeals
affirmed the trial judge's order
staying the proceedings in state court
where plaintiff was prosecuting actions
in both the federal District Court and
in the state trial court, the latter
having been brought to protect the
plaintiff from the running of the
statute of limitations "in the event
the federal action should be dismissed
for lack of jurisdiction." 241 S.E.2d
at 124.

Petitioner must have known that
the pendency of this action in the
District Court would not suspend the

running of the statute of limitations applicable to his state law claims.

If Petitioner was aware that he could have avoided the bar of the statute of limitations by filing an action in state court asserting his state law claims while his federal court action was pending, he apparently chose not to do so.

Further, Petitioner, when he appealed to the Court of Appeals from the District Court's Order dismissing this case, could have argued that the District Judge abused his discretion by not exercising pendent jurisdiction as to the state law claims. He could have advised the Court of Appeals that he no longer had viable state claims which could be asserted in state court, and he could have

argued this circumstance in support of his contention that the District Judge abused his discretion. He did not do so.

Instead of filing a timely petition for rehearing in the Court of Appeals following its June 7, 1977 decision, or petitioning for Certiorari (A-2,A-1) , Petitioner, more than three months later, filed an action in state court which he knew was barred by the statute of limitations. As noted earlier, Petitioner indicates he assumed that the Court of Appeals, by citing United Mine Workers v. Gibbs in its decision, "mandated" such a procedure. Later, Petitioner filed in the Court of Appeals his motion in which he, for the first time, addresses himself to the pendent

jurisdiction question and his inability to proceed in state court, which matters, though probably not persuasive under the circumstances of this case, he could have brought to the attention of the District Court and the Court of Appeals earlier.

Petitioner's efforts to lay upon the Court of Appeals the blame for his own mismanagement of his case and his lack of diligence are offensive and unjustified.

Petitioner apparently contends that pendent jurisdiction must be exercised in every case in which a litigant has permitted a statute of limitations to run with respect to state law claims through his failure to assert them in state court in a timely manner. He also appears to

contend that, under such circumstances, the exercise of pendent jurisdiction would not longer be a matter of discretion. We do not believe that any authority Petitioner cites can be read in such a way to support these contentions.

With respect to the merits of Petitioner's state law claims, we suggest that the legislation specifically granting to the State Board of Alcoholic Control regulatory control of the advertising of alcoholic beverages in North Carolina (N.C. G.S. §§18A-10, -15(14).) (A-5,A-6), and the absence of any State Board regulation requiring warnings of the kind Petitioner claims Respondents were under a duty to give, precludes the application of the general warranty

statutes to which Petitioner refers.
See, e.g., National Food Stores v. North
Carolina Board of Alcoholic Control, 268
N.C. 624, 151 S.E.2d 582 (1966).

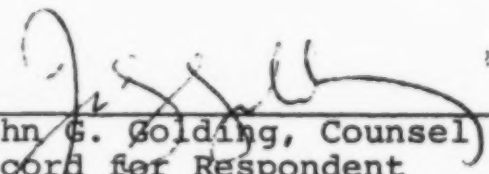
Finally, in view of Petitioner's
lack of diligence in protecting any
rights he had to prosecute his state
law claims and in view of the fact
that Petitioner himself, not the Court
of Appeals, is responsible therefor,
we submit that no "special and
important reasons" exist for granting
certiorari and that a review in this
case would serve only to benefit
Petitioner and would not resolve a
matter of importance to the public.
U.S. Supreme Court Rule 19. See
generally Rice v. Memorial Park
Cemetery, 349 U.S. 70 (1955); Layne &

Bowler Corporation v. Western Well
Works, Inc., et al, 261 U.S. 387
(1923).

CONCLUSION

For the reasons stated above, we
urge the Court to deny the Petition
for Certiorari.

Respectfully submitted this 15th
day of May, 1978.


John G. Golding, Counsel of
Record for Respondent
Mecklenburg Board of
Alcoholic Beverage Control

OF COUNSEL:
GOLDING, CREWS, MEEKINS, GORDON & GRAY
806 East Trade Street
Suite 301-400 Attorneys Building
Charlotte, North Carolina 28202
Telephone: (704) 374-1600

APPENDIX

28 U.S. Code §2101

"§2101. Supreme Court; time for appeal
or certiorari; docketing; stay

"(c)" Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rule 40(a) of the Federal Rules
of Appellate Procedure

"Rule 40.

"PETITION FOR REHEARING

"(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."

* * *

North Carolina General Statute §1-46

"§1-46. Periods prescribed. --
The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (C.C.P., s. 30; Code, s.151; Rev., s.390; C.S., s. 436.)

★ ★ ★

North Carolina General Statute §1-53(4)

"§1-53. Two years. - - Within two
years - - -

"(4) Actions for damages on
account of the death of
a person caused by a
wrongful act, neglect or
default of another, under
§28-173 of the General
Statutes of North Carolina.
(1874-5, c. 243; 1876-7,
c. 91, s. 3; Code; ss. 756,
3836; 1895, c. 69; Rev.,
s. 396; C.S., s. 442; 1931,
c. 231; 1937, c. 359; 1945,
c. 774; 1951, c. 246,
s.2.)"

* * *

Pertinent provisions of Chapter 18A of the General Statutes of North Carolina

"§18A-1. Purpose of Chapter. ----
The purpose and intent of this Chapter is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedure to insure, as far as possible, the proper administration of this Chapter under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, and possession of intoxicating liquors shall be prohibited except as authorized in this Chapter. (1937, c. 49, s. 1; 1971, c. 872, s. 1.):

* * *

"§18A-10. Advertisements. -- It shall be lawful to advertise anywhere or by any means or method liquor or the manufacture, sale, keeping for sale, or furnishing of the means by which it may be obtained, or where, how, from whom, or at what price it may be obtained, provided such advertising complies with the rules and regulations of the State Board of Alcoholic Control. (1923, c. 1, s. 3; C.S., s. 3411(c); 1933, cc. 216, 229; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)"

* * *

"§18A-15. Powers and authority of State Board. -- The State Board of Alcoholic Control shall have power and authority as follows:

* * *

- "(14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law."

* * *

"§18A-17. Powers and duties of county boards. - - The said county boards shall each have the following powers and duties:

- "(1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county;
- "(2) Power to buy and to have in its possession and to sell alcoholic beverages within its county;

* * *

"(7) To import, transport,
receive, purchase, sell,
and deliver and have in its
possession for sale for
present and future delivery
alcoholic beverages;

* * *